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IN THE

Supreme Court of the United States

October Term, 1993

CLEVELAND SURGI-CENTER, INC., PLANNED PARENTHOOD ASSOCIATION OF CINCINNATI, AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., WOMEN'S PAVILLION, INC., D/B/A CENTER FOR CHOICE II, WOMEN'S MED & CENTER LTD., D/B/A WOMEN'S MED & CENTER OF DAYTON, and LEE I. RUBINSTEIN, M.D.,
Petitioners,

vs.

STEPHANIE TUBBS JONES and JOHN H. GIBBON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent is in general agreement with petitioners' statement of the case. There is one point petitioners omitted, however, that respondent believes should be mentioned. The District Court *did* indeed deny petitioners' Rule 59(e) motion to reconsider and alter or, alternatively, to amend the judgment, in which petitioners requested leave to file an amended complaint asserting petitioners' intent to violate the statute or to add or drop parties in accordance with the District Court's standing ruling. However, after finding "(i)t would be inappropriate for the Court to allow the plaintiffs to amend a complaint that has been dismissed on standing grounds," the District Court went on to note that the "case was *not* . . . dismissed on the merits. The plaintiffs are free to correct the standing deficiency and file a new case." Petitioners' appendix at 28a (emphasis added).

At that point petitioners had the option of filing a new complaint with additional parties to attempt to correct the standing deficiencies of the first complaint. Rather than pursue that option, petitioners chose to invoke the time and resources of the Sixth District Court of Appeals and, now, this Court. Respondent respectfully suggests that it would not be inappropriate for this Court, in determining whether to grant the writ, to consider the availability of such alternative remedies to petitioners.

REASONS FOR DENYING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED AS THIS CASE INVOLVES ONLY THE APPLICATION OF SETTLED LEGAL PRINCIPLES AND IS IN HARMONY WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Sixth Circuit Correctly Distinguished The Factual Allegations In This Case From Those Present In The Case Of *Planned Parenthood League v. Bellotti.*

As acknowledged by petitioners, the statutes at issue, Ohio Revised Code §§2151.85, 2919.12 and 2505.073 (hereinafter referred to as "the statute"), have been upheld by this Court in their entirety in a previous facial challenge to their constitutionality. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). Petitioners argue, however, that the statute has been applied in an arbitrary manner by the Ohio courts, depriving pregnant minors of their constitutional right to obtain abortions without parental consent. Pursuant to a decision of this Court which arguably left open the possibility of an operational challenge to a facially valid statute. *Bellotti v. Baird*, 443 U.S. 622, 645 n.25 (1979) ("*Bellotti II*") petitioners request that this Court declare the statute unconstitutional *as implemented* and enjoin enforcement in its entirety. Petitioners' appendix at 63a-64a. Petitioners cite the First Circuit's decision in *Planned Parenthood League v. Bellotti*, 868 F.2d 459 (1st Cir. 1989) ("*Bellotti IV*") as authority for their contention that petitioners, as medical care providers, have standing to bring this action.

Respondent believes that the Sixth Circuit correctly distinguished the claims in this case from the facts presented in *Bellotti IV*. In *Bellotti IV*, the plaintiffs

alleged that although the statute at issue on its face appeared to provide an adequate bypass procedure, its *implementation* had resulted in a *denial of access* to the judicial system due to delays in decision making and the refusal of some judges to hear petitions. By contrast, in the instant case, petitioners do not allege that pregnant minors in Ohio have been denied *access* to the judicial system. Rather, petitioners claim that some judges in Ohio are making *erroneous decisions* allegedly violating the pregnant minors' substantive due process rights.

To the extent the holding in *Bellotti IV* has any application to the instant case, it comports with the decision of the Sixth Circuit. In *Bellotti IV* the First Circuit held that the plaintiffs should have the opportunity to show that the statute as implemented did not provide minors access to the court system. But the Court went on to hold that the plaintiff would not be allowed to show, through operational data, that the two-parent consent requirement was unsupported by a compelling state interest. *Planned Parenthood League v. Bellotti*, 868 F.2d at 467-468. Such a challenge was precluded by this Court's previous decision in *Bellotti II* that the statute was facially constitutional. *Id.* at 468, citing *Bellotti v. Baird*, 443 U.S. at 637-38.

In a similar manner, petitioners, although ostensibly mounting an "as applied" challenge, are actually seeking to *relitigate* the issues already determined by this Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). The Sixth Circuit recognized as much when it noted that petitioners, in making their argument that the lack of standards in the statute had resulted in arbitrary decisions by state judges, appeared to be mounting a "vagueness challenge" to the statute. Petitioners' appendix at 9a. As noted by the Sixth Circuit, "vagueness challenges are facial challenges, and

such challenges are foreclosed here where the Supreme Court has held that the statute comports with due process on its face." *Id.*

The proper vehicle to raise a challenge such as that presented by petitioners is to seek review of state court decisions in which minor plaintiffs were denied permission to obtain abortions. For instance, it would have been appropriate to have appealed the Ohio Supreme Court's decision in *In Re Jane Doe* (1991), 57 Ohio St. 3d 135 to this Court. Petitioners claim that "(i)t is obviously impractical . . . to expect individual minors to litigate systematic abuses by carrying their waiver petitions not only through the entire state court appellate process but then, in search of federal court relief, by petition for certiorari to this Court." Petitioners' Brief at p. 12. However, expediency is not a basis for enlarging the jurisdiction of the federal courts.

Article III of the United States Constitution limits the judicial power of the United States to the resolution of "cases" or "controversies" and requires a showing that the plaintiff has suffered an injury which is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-472 (1982) citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39, 41 (1976). In this case, petitioners seek to have the federal courts enjoin enforcement of a constitutional statute based upon allegations that the state courts have, in some instances, applied the statute in an unconstitutional manner. The Sixth Circuit correctly ruled that the federal courts do not have the authority to grant petitioners the relief sought, and that petitioners therefore lack standing to bring this action.

B. The District Court And The Sixth Circuit Correctly Ruled That Petitioners Lacked Standing Because They Failed To Allege An Intent To Violate The Statute.

The District Court dismissed this action on the basis that petitioners, as medical care providers, lacked standing to bring an operational challenge as they failed to allege an intent to violate the statute. One of the Sixth Circuit judges affirmed on the same basis. The majority in the Sixth Circuit affirmed on a different basis, noting:

> We express no opinion on whether a physician's potential criminal liablity under an abortion law that has been upheld as facially valid is sufficient to confer standing in an as applied challenge. We hold only that the District Court erred in making plaintiffs' intent to violate the statute determinative of their standing to bring the action. (Petitioners' appendix at 41.)

Respondent submits that the decision of the lower court was in accord with both Sixth Circuit precedent and the principles enunciated by this Court, and was an appropriate basis upon which to dismiss the action.

This Court recently noted that in order to establish standing a plaintiff must demonstrate he has

> suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical' ". (Citations omitted). *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992).

Respondent does not dispute petitioners' contention that the "threat of prosecution" may be sufficient "injury" in some circumstances to confer standing upon a party who

intends to engage in conduct prohibited by an allegedly unconstitutional statute.[1] However, in the instant case, petitioners do not allege sufficient facts to show they have suffered an "injury." Petitioners do not allege that they intend to violate the statute. They do not allege that they have had to deny any of their minor patients an abortion because of the failure of a juvenile court to grant a waiver.[2] The instant case is thus substantially similar to the case of *City of Akron v. Akron Center for Reproductive Health*, 651 F.2d 1198, 1211 (6th Cir. 1981), *aff'd in part, rev'd in part, City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), in which the Sixth Circuit held that a physician who did not allege an intent to perform post-viability abortions had no standing to challenge an ordinance which prohibited such abortions.

As noted by the District Court, petitioners have failed to cite any case in which a party was found to have standing absent a declaration that he intended to engage in conduct in violation of the particular statute in question. Petitioners' appendix at 28a, footnote 2. Petitioners rely heavily upon *Doe v. Bolton*, 410 U.S. 179 (1973); however, that case never addressed the issues raised in this appeal, in that the *specific allegations* of the plaintiffs' complaint were not set forth in this Court's opinion or addressed by this Court. In the other cases previously cited by petitioners, the plaintiffs had

[1] Respondent, however, shares the concern of the Sixth Circuit as to whether standing could be established by petitioners in this case even by an allegation of intent to violate the statute, since the statute has already been ruled facially constitutional by this Court.

[2] The newspaper article attached to petitioners' complaint seems to indicate that the overwhelming number of bypass requests in Ohio have been granted. It further suggests some or all of the minors whose applications have been rejected are going to other counties and successfully obtaining waivers.

specifically alleged that they intended to engage in conduct in violation of a statute, or otherwise alleged facts to show concrete injury. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Singleton v. Wulff*, 428 U.S. 106 (1976).

Petitioners also have argued that they have standing to assert the rights of their minor patients irrespective of their own "injury" or lack thereof. However, this proposition is clearly contrary to established case law. If a party does not suffer any "injury in fact" from the operation of a statute or ordinance, he does not have a "sufficient concrete interest in the outcome" of the case to meet the Article III case or controversy requirement. *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1221 (6th Cir. 1981), citing *Singleton v. Wulff*, 428 U.S. 106 (1976). In such case, the party does not have standing to assert the rights of third parties. *Id.* Specifically, the Court ruled in the *Akron* case that a physician who lacks standing to challenge a law regulating abortion also lacks standing to assert the rights of his patients.

CONCLUSION

If the Sixth Circuit had *reversed* the District Court decision, then respondent agrees that this case would involve important constitutional issues, as such a decision would have expanded the Federal Courts' Article III jurisdiction far beyond any limits previously established by this Court. However, in *affirming* the District Court, the Sixth Circuit simply followed established precedent. There are no issues which warrant review by this Court.

For all of the reasons cited herein, respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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